

# Law Office of Leah B. Moody, LLC

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**RECEIVED**

February 15, 2016

FEB 19 2016

Mr. Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

**S.C. SUPREME COURT**

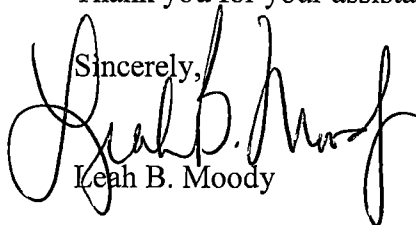
RE: Kashif Nash v. State of South Carolina  
Case No.: 2014-CP-44-401

Dear Mr. Shearouse:

The Union County Court of Common Pleas appointed my office to represent Kashif Nash in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/jh  
Enclosure

cc Kashif Nash  
Rutledge Johnson, Esquire  
Clerk of Court, Union County  
Sharon Graham, SCCID

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM UNION COUNTY  
Court of Common Pleas

Brooks Goldsmith, Presiding in Union County

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Case No. 2014-CP-44-401

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FEB 19 2016

Kashif Nash, ..... Appellant,

**S.C. SUPREME COURT**

v.

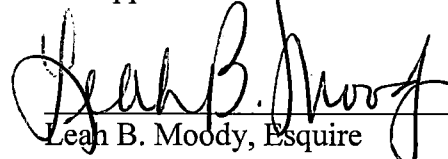
State of South Carolina, ..... Respondent.

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**NOTICE OF APPEAL**

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Kashif Nash appeals the order of the Honorable Brooks Goldsmith, dated December 28, 2015 and mailed on January 19, 2016. Appellant received written notice of entry of the final order on January 21, 2016.

  
Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

Other Counsel of record:  
Rutledge Johnson, SC Attorney General's Office  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-3970

**IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

---

**APPEAL FROM UNION COUNTY  
Court of Common Pleas**

**Brooks Goldsmith, Presiding in Union County**

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**Case No. 2014-CP-44-401**

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**Kashif Nash, ..... Appellant,**

**v.**

**State of South Carolina, ..... Respondent.**

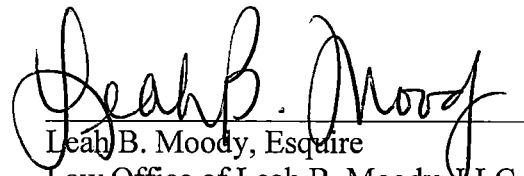
**RECEIVED**  
FEB 19 2016  
S.C. SUPREME COURT

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on Rutledge, Johnson by depositing a copy of it in the United States Mail, postage prepaid, on 2/16, 2016 addressed to its attorney of record, Rutledge Johnson, Post Office Box 11549, Columbia, South Carolina, 29211-1549.

  
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February 15, 2016  
cc Kashif Nash  
Rutledge Johnson, Esq.  
Clerk of Court, Union County  
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF UNION )  
 )  
Kashif Poiteia Nash, #358744, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
OF THE SIXTEENTH JUDICIAL CIRCUIT

2014-CP-44-0401

**ORDER OF DISMISSAL**

FILED FOR RECORD  
2016 JAN 15 PM 12 43  
CLERK OF COURT  
UNION, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 7, 2014. Respondent made its Return on or about February 13, 2015. An evidentiary hearing into the matter was convened on November 3, 2015, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Leah Moody, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Ricky Harris, Esquire, also testified. This Court had before it a copy of Applicant's records from the Union County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's PCR Application, and Respondent's Return.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. Applicant was indicted at the August 2013 term of the Union County Grand Jury for Habitual Traffic Offender (2013-GS-44-0918) and at the January 2014 term of the Union County Grand Jury for Possession of Cocaine (2014-GS-44-0033). He was represented by Ricky Harris, Esquire. On February 4-5, 2014,

Applicant was tried by a jury and convicted both charges as indicted. The Honorable Lee S. Alford sentenced Applicant to confinement for six (6) years for Possession of Cocaine, 3<sup>rd</sup> offense and five (5) years, concurrent, for Habitual Traffic Offender.

A notice of appeal was filed on Applicant's behalf. Thereafter, Applicant signed an affidavit and submitted to the Court of Appeals, informing the Court of Appeals that he wished to dismiss his appeal. The Court of Appeals issued an Order dismissing Applicant's appeal on November 7, 2014. The Remittitur was issued on November 24, 2014.

In this PCR action, Applicant alleged he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Counsel failed to communicate with Applicant
  - b. Counsel failed to object to improper impeachment of Junior Rogers
  - c. Counsel failed to object to improper closing argument by the State
  - d. Counsel failed to argue Applicant's position about whether Applicant was in custody when questioned by the officer and whether Applicant was detained on private property
2. Insufficient chain of custody
3. Unreasonable search

## II. SUMMARY OF THE TESTIMONY

### Applicant's Testimony

Applicant testified that he believed Counsel should have objected to improper impeachment questioning of Junior Rogers during the State's cross examination. Applicant testified that the Assistant Solicitor asked Rogers about a prior ABHAN conviction and that Counsel should have objected because no balancing test took place. Applicant further testified that Counsel should have attacked the credibility of the responding officer (Officer Roger Suber) during cross examination.



Applicant testified that Counsel was ineffective for failing to effectively argue Miranda<sup>1</sup> in his closing to show that he was in custody when he made a statement to the police. Applicant further testified that Counsel should have put Applicant on the stand to let him explain that he was in custody. He explained that he wanted to testify but Counsel told him that his prior convictions could be used against him. He testified that he believed Counsel gave him the wrong advice about his prior convictions and how they could be used to impeach him.

Applicant also testified that the evidence should have been suppressed because only cocaine residue was found from the items seized and no weight was recorded.

Applicant testified that he wanted Counsel to challenge the indictment because he was originally given a Uniform Ordinance Summons for possession of drug paraphernalia and believed he could not be charged with possession of cocaine. He testified that he discussed this with Counsel but it did not come out at trial.

Applicant testified that Counsel should have made a pre-trial objection to the chain of custody because the chain of custody does not list the location. The document in question provided by Applicant is titled Union County Sheriff's Office Receipt for Property Chain of Custody. Applicant also testified that the responding officer, Officer Suber, took the scales from Applicant's pocket, placed it on the car, and then in the evidence BEST kit.

Applicant testified that Counsel should have made a pre-trial objection to suppress the evidence because he believed Officer Suber conducted an unreasonable search of his person and the car.

### **Counsel's Testimony**

Counsel testified that he has been practicing law for thirty-two years with twenty-five years of criminal experience. He testified that his practice mostly consists of defending DUI and


<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

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drug offenses. He testified that he became involved in Applicant's case when Applicant called him after being arrested. He testified that he met with Applicant several times in his office and discussed plea negotiations, possible defenses, and the charges he was facing. He testified that the State had a strong case against Applicant and the plea negotiations were unsuccessful. Counsel testified that he received a plea offer of eighteen months incarceration that he advised Applicant to accept it. He testified that he also received a plea offer of a three-year cap on incarceration followed by probation. Counsel further testified that Applicant did not want to plea and maintained his innocence by insisting that he was not driving the vehicle and that Officer Suber was trying to pin the crime on him.

Counsel testified that he received full discovery including the incident report, drug report, Applicant's driving record, the chain of custody documents, and the video recording of the stop. He testified that he did not believe there to be any problem with the SLED report and the chain of custody, and found no flaws in the chain. He testified that he had no grounds to make a motion to suppress the evidence based on the chain of custody.

Counsel testified that he reviewed all of the discovery items with Applicant and discussed the video at length. Counsel testified that he did make a suppression motion pre-trial and successfully argued to keep out a portion of the video that included improper questioning by Officer Suber during the stop. He testified that the drugs were found as a result of a search incident to arrest and there was no reason to challenge it. He also testified that there was no legal reason to challenge the cocaine residue. He testified that he highlighted to the jury that there was no measurable amount of cocaine recorded by SLED and argued in defense that Applicant did not knowingly possess cocaine.

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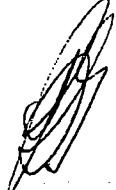
Counsel testified that he did not remember Applicant wanting to take the stand to testify and never got the impression that Applicant wanted to testify. He testified that he did not think Applicant would have provided helpful testimony and also testified that he believed Applicant had a strong chance to win at that point. Counsel testified that he explained impeachment to Applicant but never told Applicant not to take the stand because of his prior record. Counsel further testified that he did inform Applicant that his prior drug record could be used to impeach him and Applicant had no questions concerning that issue.

Counsel testified that he did not see a reason to object to the State impeaching Junior Rogers by bringing up his ABHAN conviction. He testified that it did not hurt Applicant's case and would not have made a difference in the case. Counsel testified that Rogers' testimony did not help the State because the testimony was already filled with inconsistencies and impeachment by the video recording.

Counsel testified that he did not object to the State's closing argument because he did not think that the State improperly vouched for Officer Suber. He testified that he did not think any statements were improper at the time.

### III. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive

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on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

### **Ineffective Assistance of Counsel**


This Court finds that Applicant failed to meet his burden of proving that his trial counsel was ineffective. First, this Court finds that Applicant has failed to prove that Counsel was deficient for failing to communicate with Applicant. This Court finds Counsel's testimony persuasive that he met with Applicant several times and discussed all plea offers, discovery, possible defenses, and the charges he was facing.

Next, this Court also finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to object to improper impeachment of Junior Rogers. On cross-examination of Junior Rogers, the State asked if he had been convicted of assault and battery of a high and aggravated nature. (See Trial Tr. p. 239, ll. 2-6). This Court finds that Counsel was not ineffective for failing to object to this impeachment because it was proper under SCRE Rule 609(a)(1) as ABHAN is punishable by more than one year imprisonment. Even so, this Court finds that Applicant has failed to show that the outcome of the trial would have been different if Counsel had objected. Therefore, this allegation must be dismissed.

Next, Applicant alleges that Counsel was ineffective for failing to object to improper vouching during the State's closing argument. Applicant's concern includes the statements:

So if it just comes down to which person do you believe, I submit to you Deputy Suber certainly has no reason to risk his job and his freedom to come here and swear under oath that he had seen Mr. Nash drive the car if he didn't see Mr. Nash drive the car. He knows Mr. Nash. He has known him for years. He knows his entire family. He sees them every other week at church. He has had conversations with him about driving and his driver's license status. He would not be mistaken.


(Trial Tr. p. 286, ll. 23-25 to p. 287, ll. 1-7).

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This Court finds Counsel was not ineffective for failing to object because the remarks do not rise to the level of improper vouching. A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. Matthews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). However, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." Smith at 523, 654 S.E.2d at 531-32 (quoting Matthews at 276, 565 S.E.2d at 768 (2002)). "The appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Counsel testified that he did not object to the comment and did not think the remark merited an objection in the middle of the State's closing. Additionally, this Court finds that Applicant has failed to establish any resulting prejudice because, when looking at the entire record, the remark was harmless and in no way affected the outcome of the trial. Applicant has failed to meet his requisite burden of proof in regards to this allegation. Therefore, this allegation must be denied and dismissed with prejudice.

Applicant next alleges that Counsel failed to argue Applicant's position about whether Applicant was in custody when questioned by the officer and whether Applicant was detained on private property. This Court finds that Counsel's actions were not deficient as he did make such arguments to the trial court and, in doing so, was successful in keeping out a portion of the video because it involved improper questioning. (See Trial Tr. pp. 73, 75, 76, 88, 91, 93). Additionally, this Court finds that Counsel was not ineffective for failing to argue that the search was unreasonable because, as Counsel testified, the search was lawfully conducted incident to Applicant's arrest. Applicant has failed to meet his requisite burden of proof in regards to this allegation. Therefore, this allegation must be dismissed with prejudice.

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### All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

### V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

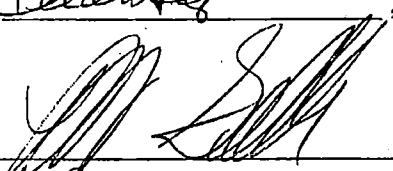
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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**IT IS THEREFORE ORDERED THAT:**

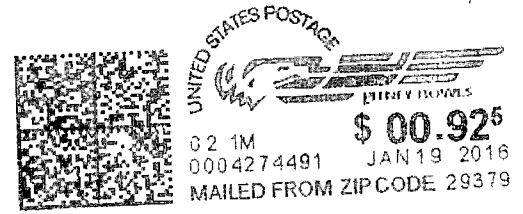
1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 28 day of December, 2015.

  
\_\_\_\_\_  
BROOKS GOLDSMITH  
Presiding Judge  
Sixteenth Judicial Circuit

**Clerk of Court**

POST OFFICE BOX 703  
UNION, SOUTH CAROLINA 29379



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Attorney at Law  
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Rock Hill, SC 29730

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February 15, 2016

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South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

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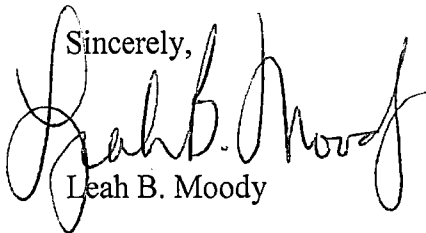
RE: Kashif Nash v. State of South Carolina  
C.A. No.: 2014-CP-44-401

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If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,



Leah B. Moody

LBM/jh

Enclosures

Cc Kashif Nash  
Daniel E. Shearouse, Supreme Court of South Carolina  
Clerk of Court, Union County  
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February 15, 2016

Union County Clerk of Court  
210 W. Main St.  
Union, South Carolina 29379

RE: Kashif Poiteia Nash v. State of South Carolina  
Case No.: 2014-CP-44-401

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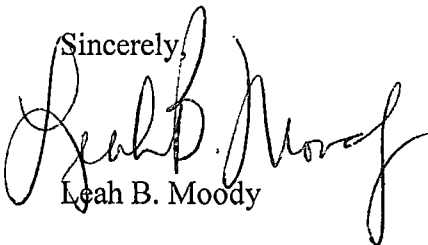
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Sincerely,



Leah B. Moody

LBM/jh

Enclosures

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**S.C. SUPREME COURT**

Ms. Sharon A. Graham  
SC Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11433  
Columbia, South Carolina 29211-1433

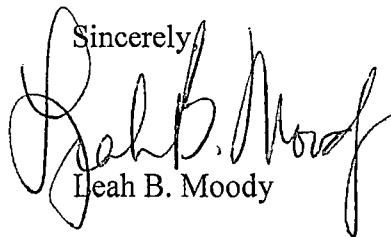
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Leah B. Moody

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